Judicial Politics, Death Penalty Appeals, and Case Selection:
An Empirical Study

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Abstract

Judges selected by partisan popular elections are believed to be subject to greater political pressure than are judges with greater independence. Studying case outcomes to test this belief requires accounting for case selection, the process through which cases are selected for litigation. This article uses two large death penalty case databases to explore the effects of judicial politics and case selection on grants of relief from death penalties. We find no substantial system-wide evidence that state judicial election methods affect case outcomes. But individual states' experiences confirm the death penalty's politically charged character. Accounting for case selection, as measured by states' rates of obtaining death penalties in murder cases, helps explain the pattern of relief from death sentences in one data base but not in the other. This could be interpreted as evidence that the federal judiciary processes death penalty cases under less political pressure than state judges. We also find that states with large death rows are not necessarily the states that pursue capital punishment most vigorously. California and Texas have large death rows. But California obtains death penalties at a lower rate per murder than any other major death penalty state. And Texas' death-obtaining rate is not noticeably different from that in other states with capital punishment.

I. Introduction

Several articles try to explain case outcomes based on the politics of judicial selection methods.[3] Scholars usually hypothesize that judges selected by partisan popular elections are subject to greater political pressure in deciding cases than are other judges. No class of cases seems more amenable to such analysis than death penalty cases. Strong anecdotal evidence suggests a relation between the politics of selection methods and death penalty appeal outcomes. Electoral removals of Chief Justice Rose Bird in California and Justice Penny White in Tennessee were directly linked to decisions in capital cases.[4] So one expects judges who must face voters to be more reluctant to overturn death sentences. And a 1980s study suggests that states' judicial selection methods correlate with capital appeal outcomes.[5]

No study, however, accounts both for judicial politics and case selection, the process through which cases are selected for death penalty litigation. Yet the case selection process cannot be ignored because it yields a set of cases for adjudication that is far from

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[3] E.g., Andrew Hanssen, The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges, 28 J. Legal Studies __ (1999) (forthcoming); M. Cohen, The Motives of Judges: Empirical Evidence from Antitrust Suits, 12 Int'l Rev. L. & Econ. 13 (1992); V. Flango & C. Ducat, What Difference Does Method of Judicial Selection Make?, 5 Justice Sys. J. 1 (1979).

[4] John Gibeaut, Taking Aim, A.B.A. J., Nov. 1996, at 50, 51; Stephen B. Bright, Hanging the Judge; Demagogues, Politicians Chip Away at U.S. Court System, Ariz. Republic, June 8, 1997, at H1; Maura Dolan, Rose Bird's Quest for Obscurity, L.A. Times, Nov. 15, 1995, at A1; Jeffrey L. Kirchmeier, Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme, 6 William & Mary Bill of Rights J. 345, 444-45 & n. 462 (1998); text accompanying notes 16, 25 infra.

[5] Gerald F. Uelmen, Elected Judiciary, in Leonard W. Levy et al., Encyclopedia of the American Constitution 171 (Supp. I 1992). This study shows meaningful differences between judges selected by executive appointment compared with judges selected by other methods. It shows no substantial differences between judges selected by various election methods.

a random selection of cases.[6] Effects based on judges' politics can only reliably be detected if one accounts for how judges are assigned cases[7] and the cross-section of cases they adjudicate.

In death penalty litigation, the case selection process begins with the prosecutor's decision to seek the death penalty. Some prosecutors are said to do so in virtually every death-eligible case.[8] That is, they seek the death penalty in almost every case arguably satisfying the criteria in their state's capital murder statute. Others exercise substantially more discretion.[9] These differences should lead to interstate variation in the death-worthiness of cases courts adjudicate. For example, consider two prosecutors. One prosecutor only seeks the death penalty in cases involving defendants who have been previously convicted of murder, been released, and murdered again. The second prosecutor seeks death in every possible death-eligible case. While acknowledging the difficulty attending any formal definition of death-worthiness, we regard the first prosecutor's collection of capital cases as being, on average, more death-worthy than the second prosecutor's collection of capital cases.

Variation in the rates at which prosecutors seek death penalties thus ought to influence the rate at which courts overturn capital sentences. A prosecutor who seeks the death penalty in every possible case will, on average, submit for judicial review a class of cases that is less death-worthy than a prosecutor who seeks the death penalty only in the most egregious of the eligible cases. The group of less death-worthy cases ought to be subject to more frequent reversal than a more selectively chosen group of cases.

In theory, case selection could frustrate efforts to detect political effects. Life-tenured, fully independent judges may challenge death sentences infrequently because they serve in a jurisdiction in which prosecutors are highly selective about the cases in which they seek death. Conversely, judges selected in highly partisan elections may reverse a significant number of death sentences because prosecutors in their jurisdiction show little restraint in seeking the death penalty.

Judicial selection politics functions against this background of case selection. Two aspects of judicial selection politics' impact are worth separating. The first focuses on interstate differences in death penalty case processing. Methods of state judicial selection are believed to correlate with death penalty outcomes. The more independent the state's judiciary, the more likely the judiciary is to strictly review death sentences. A second aspect of selection politics relates to possible differences between state and federal judges. Unlike the judges in states with many death penalties, the federal judiciary has independence from the electoral process. Whether or not interstate differences exist in

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[6] Theodore Eisenberg & Henry S. Farber, The Litigious Plaintiff Hypothesis: Case Selection and Resolution, 28 Rand J. Econ. S92 (1997).

[7] Orley Ashenfelter, Theodore Eisenberg, Stewart Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Studies 257-81 (1995); Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717 (1997).

[8] Tina Rosenberg, The Deadliest D.A., N.Y.Times, July 16, 1995, § 6, p. 22. (Philadelphia's district attorney seeks death virtually as often as the law will allow). But see David Baldus, George Woodworth, David Zuckerman, Neil Weiner & Barbara Broffitt, Arbitrariness and Discrimination in the Use of the Death Penalty: The Philadelphia Story, 83 Cornell L. Rev. __ (1998) (forthcoming).

[9] For evidence of intrastate variation in prosecutorial death-seeking behavior in Georgia, see David C. Baldus et al., Equal Justice and the Death Penalty 120, 122, 125 (1990).

capital case processing, we might expect federal judges to be more willing to question death sentences than state judges.

This article uses two databases to explore factors affecting grants of relief from death penalties. One is our database of approximately 800 appeals of death sentences decided from 1995 to 1997. It consists solely of direct appeals in capital cases and is limited to state courts. The second database is the Bureau of Justice Statistics' ("BJS") database of all persons sentenced to death from 1973 to 1995.[10] It includes information about whether a defendant obtained relief from a death sentence. The source of relief could be federal or state court but the database does not reveal which court system acted to grant relief.

Accounting for case selection, as measured by states' rates of obtaining death penalties in murder cases, helps explain the pattern of relief from death sentences in the BJS data. The rate at which prosecutors obtain death sentences strongly correlates with the rate at which relief is obtained from those sentences. But case selection does not help explain the pattern of reversals in state court death penalty appeals from 1995 to 1997. That is, we find no correlation between states' rates of obtaining death penalties and state courts' reversing capital convictions or sentences.

Furthermore, we find little evidence that states' methods of selecting judges correlates with outcomes of death penalty cases. The first aspect of judicial selection politics, interstate variation in relief from death sentences, does not depend on mode of judicial selection. The absence of such a correlation holds whether or not one accounts for case selection.[11] And the absence of correlation holds for both the BJS data and the state court appellate case data.

Although we find no system-wide evidence of the effect of state judicial election methods on case outcomes, developments in individual states do confirm the death penalty's politically charged character. But the pattern of challenges to individual state justices, and the responses manifested in death penalty adjudication, are not readily explained by the conventional belief that justices are most vulnerable in states with partisan judicial elections. For example, California is generally not classified as a state with partisan judicial elections yet death penalty politics played a major role in reconstituting its supreme court.[12] So interstate differences in death penalty case processing are not readily explicable by judicial selection methods.

We find indirect evidence that the federal judiciary processes death penalty cases differently than state judges. The correlation in the BJS data between states' death-obtaining behavior and relief from death penalties suggests that death penalty decisionmaking that includes the federal judiciary reflects differences in the underlying death-worthiness of cases. The absence of such a correlation in the state court appellate

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[10] U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment in the United States, 1973- 1995, produced and distributed by Inter-university Consortium for Political and Social Research (No. 6956 1997).

[11] But a significant correlation obtains if one recharacterizes Ohio from a nonpartisan election state to a partisan election state. Excluding Ohio, there is not even a near-significant difference. See text accompanying note 70 infra.

[12] Text accompanying note 25 infra.

data could be interpreted as evidence of pressure to affirm death penalty cases with less attention to their death-worthiness.[13]

Studying states' varying death-obtaining behavior also offers a new perspective on states' overall capital case behavior. In particular, states with large death rows are not necessarily the states that pursue capital punishment most vigorously. California and Texas have large death rows. But California obtains death penalties at a lower rate per murder than any other major death penalty state. And Texas' death-obtaining rate is not noticeably different from that in other states with capital punishment.

One caveat is in order. Appellate judges of course are not free to reverse capital case convictions or death sentences based on personal notions of death-worthiness. They are constrained by the requirement that there be legal error. We assume that the tendency to detect legal error is related to some underlying notion of death-worthiness, though not solely determined by perceived death-worthiness.

Part II of this article documents recent campaigns to oust judges based on their decisions in death penalty cases. These campaigns suggest that judges subject to partisan elections will be reluctant to question death sentences. Part III explains our methodology for exploring the relation among judicial elections, states' death-obtaining rates, and judicial review of capital cases. Part IV reports our empirical results.

II. Campaigns to Oust Judges Based on Death Penalty Decisions

Several initiatives have sought to unseat state supreme court judges because of their votes in capital cases.[14] The most prominent recent campaign involved former Tennessee Supreme Court Justice Penny White. Ms. White was appointed to the state's highest court in 1995. She participated in only one capital case during her eighteen month tenure on the court–*State v. Odom*[15]–a case in which the defendant's death sentence was unanimously reversed.[16] Justice White did not author the court's opinion and a review of the *Odom* decision reveals that reversal of the defendant's death sentence (his murder conviction was affirmed) was mandated by previously existing state law which Justice White had no role in creating.[17]

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[13] We also have data on about 500 state post-conviction appeals. Including them would not change the results reported here. We exclude state post-conviction activity because states' do not all issue opinions in such cases. Appeals in Missouri death penalty cases often are described as appeals from post-conviction proceedings. E.g., State v. Butler, 951 S.W.2d 600, 601 (Mo. 1997); State v. Kenley, 952 S.W.2d 250 (Mo. 1997). But they are more in the nature of direct appeals from denials of post-trial relief and not true post-conviction proceedings. We therefore treat these Missouri cases as direct appeals.

[14] Many of these efforts are described in more detail in Stephen B. Bright, Political Attacks on the Judiciary: Can Justice be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions? 72 N.Y.U. L. Rev. 308 (1997); Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B. U. L. Rev. 759 (1995).

[15] 928 S.W.2d 18 (Tenn. 1996).

[16] Id.; see also Gibeaut, supra note 2.

[17] Among the grounds relied on for reversal were at least two violations or misinterpretations of express statutory commands. The State relied on an aggravating circumstance set forth in Tenn. Code Ann. § 39-13-204(i)(8), which allows imposition of a death penalty upon a finding that "the murder was committed by the defendant while the defendant was in lawful custody or in a place of

But her retention election came soon after the *Odom* decision, and the new Republican Governor of Tennessee–Justice White was appointed by a Democrat–in conjunction with several victim's rights groups, orchestrated a high profile campaign to unseat Justice White because of her concurring vote in *Odom*. Justice White was attacked as putting "the rights of criminal before the rights of victims," and as believing that "repeatedly raping and stabbing to death a 78 year old woman wasn't heinous enough for the death penalty."[18] It worked and Justice White was not retained. Since then other members of the Tennessee Supreme Court have announced that they will not stand for re- election.[19] The Governor of Tennessee was asked after Justice White's defeat if a judge should "look over his shoulder" when making decisions. He responded: "I hope so."[20]

Texas went through a similar experience in 1994. A Texas Court of Criminal Appeals decision reversing a high profile capital case led the Chairman of the state Republican Party to call for a takeover of the court.[21] Voters answered the call as Republican candidates won every position they sought on the court. One of the new judges was Stephen W. Mansfield, who campaigned for the court on promises of expansion of the death penalty, greater use of the harmless-error doctrine, and sanctions for attorneys who file "frivolous appeals especially in death penalty cases."[22]

In 1992, Mississippi Supreme Court Justice James Robertson was defeated in his re-election bid. The central issue in the campaign was the death penalty. One advertisement used by his opponents urged the citizens of Mississippi to "vote against Robertson because he's opposed to the death penalty and he wants to let all these people go." [23] His opponent in the Democratic primary ran as a "law and order candidate" with the endorsement of the Mississippi Prosecutors Association. He declared that Robertson

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lawful confinement or during the defendant's escape from lawful custody or from a place of confinement." The *Odom* court held that an escapee whose escape had been completed was not covered by the escape provision in the statute. 928 S.W.2d at 27. The court also held that the trial court erred in refusing to admit, as evidence in mitigation, psychological testimony about the defendant's personal and psychological history. This refusal contradicted a Tennessee statute plainly contemplating testimony about the defendants' background history. Id. at 27-28.

[18] Stephen B. Bright, Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights, 54 Wash. & Lee L. Rev. 1, 11 (1997).

[19] Id.

[20] Paula Wade, White's Defeat Poses Legal Dilemma: How is a Replacement Justice Picked?, Com. Appeal (Memphis, Tenn.), Aug. 3, 1996.

[21] Janet Elliott & Richard Connelly, Mansfield: The Stealth Candidate; His Past Isn't What It Seems, Tex. Law., Oct. 3, 1994, at 1, 32. The case was Rodriguez v. State, 848 S.W.2d 141 (Tex. Crim. App. 1993).

[22] John Williams, Election '94: GOP Gains Majority in State Supreme Court, Houston Chron. , Nov. 10, 1994, at A29. Ironically, it turned out that Judge Mansfield had misrepresented his prior background, experience, and record and after winning the election was deemed an "unqualified success." Jane Elliot, Unqualified Success: Mansfield's Mandate; Vote Makes a Case for Merit Selection, Tex. Law., Nov. 14, 1994, at 1.

[23] Symposium: Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?, 21 Fordham Urban L. J. 239, 281 n. 4 (1994).

thought that "a defendant who 'shot an unarmed pizza delivery boy in cold-blood' had not committed a crime serious enough to warrant the death penalty."[24]

Chief Justice Exum of the North Carolina Supreme Court was opposed because of his anti-death penalty views.[25] He was forced to fight back with statistics outlining the number of cases in which he had voted to affirm the death sentence. While he was re-elected once, he announced that he would not run again when his current term expired in 1998.[26]

Perhaps the best known of these incidents occurred in California. In the mid-1980s three members of the California Supreme Court–including Chief Justice Rose Bird--lost

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[24] David W. Case, In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi, 13 Miss. C. L. Rev. 1, 15-20 (1992); Death Penalty Caused Judge's Fall, Critics Say, Greenwood Commonwealth (Miss.), Mar. 13, 1992, at 3; Incumbent Robertson Defeated, Greenwood Commonwealth (Miss.), Mar. 11, 1992, at 1; Carole Lawes & Beverly Kraft, High Court Judge Coddled Criminals, Critics Say, Clarion-Ledger (Jackson, Miss.), Mar. 13, 1992, at 1B. The resolution of the prosecutors association asserted that Robertson's opponent "best represents the views of the law abiding citizens" and "will give the crime victims and the good, honest and law abiding people of this state a hearing that is at least as fair as that of the criminal in child abuse, death penalty, and other serious criminal cases." Case, supra, at 16 n.108.

Robertson was particularly criticized for a concurring opinion maintaining that the Eighth Amendment to the United States Constitution did not permit the death penalty for rape where there was no loss of life, a position conclusively established by the United States Supreme Court years earlier. Coker v. Georgia, 433 U.S. 584 (1977). Justice Robertson was also villified for dissenting opinions in several cases that the Supreme Court subsequently reversed.

[25] Joseph Neff, Exum Retiring as Chief Justice at End of Year, The News & Observer , Raleigh, NC, July 28, 1994,at A1, 1994 WL 6582854. On Chief Justice Exum's death penalty views, see N.C.'s Top Judge Blasts Death Penalty, The Atlanta Journal-Constitution, June 15, 1994, at A3, 1994 WL 4447120.

[26] When asked if elected justices can survive if they sometimes overturn death sentences, he said "I think they can, but I believe it is becoming more and more difficult." Symposium, supra note 21, at 270.

For example, in his campaign for reelection to the Nevada Supreme Court, Justice Cliff Young "formed a highly-visible political alliance with the State's attorney general, who in numerous campaign advertisements publicly 'urged all Nevadans' to vote for Justice Young." Nevius v. Warden, 944 P.2d 858, 860 (Nev. 1997) (Springer, J., dissenting). Justice Young ran campaign advertisements proclaiming that he had a "record of fighting crime" which included voting to uphold the death penalty seventy-six times. Id. Young was reelected. A condemned man whose case came before the court moved to recuse Judge Young because the state was represented by the attorney general. During the pendency of the case, Justice Young had "repeatedly published his appreciation of the attorney general's support and how much he 'welcomed her support. . . . because of the attorney general's 'role as the State's top law enforcement officer.' Id.

Nevertheless, the Nevada Supreme Court denied the motion to disqualify Justice Young. Id. at 859 Justice Springer dissented saying:

> "Tough on crime" claims made by judges in election campaigns are so common in Nevada as to go almost unnoticed. Our judicial discipline authorities customarily ignore this kind of judicial misconduct once the judge becomes elected or reelected. It goes beyond "tough on crime" for a judge to claim that he is a "crime fighter," especially when, on top of this, the judge identifies his principal election supporter as being the State's attorney general. Judge are supposed to be *judging* crime not fighting it. Id.

their jobs in a retention election dominated by the death penalty.[27] The Governor was an active participant in the ultimately successful attempt to replace the judges, and went so far as to indicate to two members of the court that he may change his mind about opposing them if they voted to uphold more death sentences.[28] After the court reversed several other capital cases, the governor carried out his threat,[29] and successfully opposed the retention of all three members of the California Supreme Court.[30] Today, the California Supreme Court has a high affirmance rate in capital cases.[31]

Pressure on the judiciary can be more subtle. In South Carolina, for example, judicial elections had never been politicized. No sitting justice of the state Supreme Court had been challenged since 1893.[32] However, when Justice Toal–the state court's first female justice–stood for re-election in 1995, she was attacked as a liberal judge who was "soft on crime."[33] Republicans, who had recently gained control of the state House of Representatives, encouraged a state trial judge to run against Justice Toal.[34] While Justice Toal was ultimately successful in her re-election bid, the process had become politicized.[35] Furthermore, the new state Attorney General elected in 1994–a former prosecutor who sent eleven men to death row–was elected on the basis of his strong pro-death penalty views. Both in his campaign and following his election, he attacked the state and federal courts for the lack of executions in South Carolina. He made the widely publicized comment that South Carolina's death row was one of the safest places in the state because the courts, that is, the state courts, reversed so many death sentences on

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[27] Scott Wiener, Popular Justice: State Judicial Elections and Procedural Due Process, 31 Harv. C. R.-C. L. L. Rev. 187, 199 (1996). Chief Justice Rose Bird, Justice Cruz Reynoso, and Justice James Grodin all lost their re-election bids.

[28] Leo C. Wolinsky, Governor's Support for 2 Justices Tied to Death Penalty Votes, L.A. Times , Mar. 14, 1986, at 3. The Governor had already decided that Chief Justice Rose Bird had to be replaced because of her "anti-death penalty voting pattern." The governor had initially indicated he might oppose Justice Mosk, but in 1985 Justice Mosk voted to affirm several death penalty convictions and the governor indicated he supported Mosk's retention. John T. Wold, The Defeat of the California Justices: The Campaign, The Electorate and the Issue of Judicial Accountability, 70 Judicature 348, 349 (1986).

[29] Henry Unger, Will Vote Against Grodin, Reynoso, Deukmejian Says, L.A. Daily J. , Aug. 26, 1986, at 1.

[30] Frank Clifford, Voters Repudiate 3 of Court's Liberal Justices, L.A. Times , Nov. 5, 1986, pt. 1.

[31] Gerald F. Uelmen, Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization, 72 Notre Dame Law Rev. 1133, 1135 (1997).

[32] Robert Tanner, "Ervin says he was Waived off Toal Challenge," AP 1995 WL 6752386 (Dec. 11, 1995).

[33] Id. Justice Toal was also criticized for her actions on behalf of an inmate up for parole. Gary Karr, Panel Avoids Vote, Tries to find facts on Toal Parole letter, (AP), 1996 WL 5364574.

[34] Jesse Holland, South Carolina Bar finds Toal, Ervin Highly Qualified, (AP), 1996 WL 5361501 (Jan. 11, 1996).

[35] Justice Toal's re-election difficulties came on the heels of the failed Supreme Court bid of Victor Pyle. Judge Pyle, a conservative law and order state trial judge, was widely considered the frontrunner for a vacant spot on the South Carolina Supreme Court. However, his campaign was derailed because of a temporary restraining order he entered preventing anti-abortion protestors from picketing within one hundred yards of an abortion clinic. Judge Pyle's decision was based on controlling Supreme Court precedent but after his decision in this case became an issue, House republicans stated his campaign was 'dead in the water." He withdrew from the race.

technicalities.[36] The Attorney General was also instrumental in eliminating federal funding for death penalty resource centers, organizations which represented indigent death sentenced inmates.[37] Furthermore, when a federal district court judge granted habeas corpus relief in a capital case, the Attorney General was integrally involved in a well publicized effort to have the judge impeached.[38] He made remarks that "justice has been mocked" and used the case as an example of the need for "dramatic reform" of the death penalty system.[39] The message to South Carolina's state judges from this series of events was unmistakeable: reverse capital cases at your own peril.[40]

III. Methodology and Descriptive Statistics

These capital punishment-related campaigns against judges may lead judges subject to partisan elections to be more reluctant than other judges to question capital convictions. By partisan elections, we mean elections in which political parties are directly involved in the selection of candidates.[41] We rely on traditional classifications of states as having partisan or nonpartisan elections.[42]

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[36] Lisa Greene, Cuts Target Inmates' Defenders, The State, Aug. 25, 1995. He was quoted as saying: "I really think it is much safer to be on Death Row than to be a citizen of South Carolina." Lisa Greene, Condon: Crime Fighter or aspiring politician, The (Columbia, S.C.) State, Sept, 9, 1995.

[37] Id.

[38] Chuck Crumbo, Killers granted new trial, The (Columbia, S.C.) State, Aug. 29, 1996.

[39] Id.; see also, Michelle Davis, Death Appeal finds life, The (Columbia, S.C.) State, Aug. 4, 1997.

[40] Although this article focuses on state appellate courts, the politics of death also play out at the local and trial court levels. For example, Judge Norman Landford, a judge in Harris County, Texas, granted state habeas corpus relief in one capital case. The outraged District Attorney convinced one of his assistants to run against Landford; the assistant won. Mark Ballard, Gunning for a Judge; Houston's Lanford Blames DA.s Office for his Downfall, Tex. Law., April 13, 1993, at 1. In South Carolina, one state trial judge presiding over a state post-conviction relief action remarked to counsel that he knew the conviction was legally invalid but that he had decided "to let the federal boys take care of it." Another state judge in a post-conviction relief action denied relief but sent counsel a letter stating that "Edward Lee Elmore may well be innocent. An appellate court may agree with one of your arguments." (Letter on file with the authors.)

In Georgia, almost all of the state habeas corpus petitions are heard by two elected superior court judges in Butts County, Georgia, the county where death row is located. These judges have never once granted relief in a death penalty case. Of the cases reviewed by these judges, federal courts have found constitutional violations in over half of the cases. Symposium, The Death Penalty in the Twenty-First Century, 45 Am. U. L. Rev. 239, 285 (1995). In states where trial judges have the power to override jury recommendations in capital cases, that power is almost always exercised in favor of imposing a death sentence. In Alabama, for example, judges impose a death sentence ten times as frequently as they override a death recommendation. Uelmen, supra, at 1141. One Alabama Judge sought reelection with the campaign slogan: "Some complain that he's too tough on criminals, AND HE IS. . . We need him now more than ever." Committee to Re-elect Judge Mike McCormick, Birmingham News, Nov. 4, 1994, at 4C (advertisement).

[41] E.g., Comment, Samuel L. Grimes, "Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?, 76 N.C.L. Rev. 2266, 2273 (1998).

[42] For categorization of state electoral systems, see Stephen P. Garvey, Capital Punishment and State Supreme Court Activism in the United States: Prospects for Dialogue 132 (M. Phil. dissertation, Oxford University 1989); Hanssen, supra note 1 (figure 1). Traditional classifications

To test hypotheses about the relation between judicial selection methods and capital case outcomes, one needs a measure of the outcome of capital case appeals or other efforts to obtain relief from death sentences. But that measure should be evaluated in light of the process by which cases are selected for capital treatment. Consequently, one needs not only a measure of capital case outcomes, but also a measure of how cases are selected for capital punishment treatment.

A. Measuring States' Death-Obtaining Behavior

To assess selection of cases for capital treatment, one would ideally like to know the death-worthiness of each potential capital case considered by prosecutors and the prosecutors' decision whether to seek death. But we lack case-level knowledge of individual murder cases; we do not know the details of each case that a prosecutor may have considered for capital treatment. So we cannot independently assess whether cases warrant seeking death sentences. Second-best methods of measuring will have to suffice. To construct indices of death-obtaining behavior, we need estimates of the number of potential death penalty cases and of the number of death penalties imposed. These indices can then be used to construct a measure of death-obtaining rates that allows interstate comparisons.

1. The Number of Potential Death Penalty Cases in Each State

We use the number of murders in each state as a proxy for the number of possible death penalty cases. A crucial assumption is that the number of death-eligible murders correlates with the number of murders. The correlation need not be perfect, but it ought to be substantial. The FBI's Uniform Crime Reports indicate the number of murders for each state for each year.[43] The murder data are considered to be among the most reliable data in the Uniform Crime Reports.[44]

2. The Number of Capital Sentences in Each State

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are sometimes suspect. Comment, Nicole C. Allbritain, One Step Closer to Merit-Based Judicial Selection: Ohio's New Limitations on Judicial Campaign Contributions and Expenditures, 64 U. Cin. L. Rev. 1323 (1996) (Ohio's judicial elections are officially classified on nonpartisan but are de facto partisan elections). The most independent judiciaries tend not to be in states with substantial numbers of death penalties. Grimes, supra note 39, at 2271-72 nn. 45-47 (listing states with appointed judiciaries).

[43] U.S. Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reporting Program, Supplemental Homicide Reports, 1996, produced and distributed by Inter-university Consortium for Political and Social Research (No. 9028 1998). We relied on the same FBI data for each year back through 1985.

[44] John J. Donohue III, Did Miranda Diminish Police Effectiveness?, 50 Stan. L. Rev. 1147, 1153 (1998) (citing David Cantor & Lawrence E. Cohen, Comparing Measures of Homicide Trends: Methodological and Substantive Differences in the Vital Statistics of Uniform Crime Report Time Series, 9 Soc. Sci. Res. 121 (1980)). But see Michael Maxfield, Circumstances in Supplementary Homicide Reoprts: Variety and Validity, 27 Criminology 671, 675-81 (1989); Jonathan R. Sorensen & James W. Marquart, Prosecutorial and Jury Decision-Making in Post-*Furman* Texas Capital Cases, 18 N.Y.U. Rev. L. & Social Change 743, 762-63 (1990-91) (noting problems in Supplemental Homicide Reports data).

Given each state's number of murders, we need measures of each states' number of death penalties.[45] We assume that different rates of obtaining death sentences correlates with differences in trial level behavior, and not solely with different underlying distributions of the death-worthiness of murder cases. The trial level process involves decisionmaking by prosecutors, judges, and juries. If interstate variation exists in these groups' behavior, appellate courts will review sets of cases with varying levels of death-worthiness from state to state. We suspect that the greatest variant in trial level death-obtaining behavior is prosecutors' differences in their propensities to seek the death penalty.[46]

State law could also affect death-obtaining rates. For example, some states are regarded as having death penalty laws that make it easier to obtain death sentences than in other states.[47] States with laws that facilitate obtaining death penalties might generate a less death-worthy set of cases for appellate review.

We rely on the BJS data for the number of persons sentenced to death in each state in each year. Portions of that data covering different time periods are used for our two different databases (BJS and appellate opinions). For the BJS data covering relief from death sentences, we cumulate the number of persons sentenced to death for the years 1985 to 1994. This yields the total number of death sentences obtained by each state for the those years. For the appellate opinion data, we use the number of BJS-reported death sentences for the period 1994 to 1996. The time periods are chosen to coordinate with the periods covered by the BJS and appellate opinion databases, described in more detail below.

3. States' Death-Obtaining Indices

We combine our measures of the number of possible death cases (as measured by the number of murders) and the number of death penalties to compute states' death-obtaining rates. For the BJS data, we divide the number of persons reported by the BJS to have been sentenced to death in each state from 1985 through 1994 by the number of murders in the state, based on the 1985 to 1994 Uniform Crime Reports data. For the appellate opinion data, we divide the number of persons reported to have been sentenced to death from 1994 to 1996 by the number of murders in the state, based on 1994 to 1996 FBI Uniform Crime Reports.

B. Measuring Relief from Death Sentences

We use two measures of relief from death sentences. One is based on the outcomes of capital sentence appeals reported in our database of state court appellate opinions. The other is based on relief rates reported in the BJS capital punishment database.

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[45] A more complete model would account not only for states' death-obtaining behavior but also for their death-seeking behavior. Measuring death-seeking behavior requires knowing, inter alia, the number of cases in which prosecutors sought death, regardless of case outcome.

[46] Prosecutors who consistently seek death in less death-worthy groups of cases should have lower rates of capital sentences at the trial court level. But some less death-worthy cases will survive the trial process.

[47] Baldus et al., supra note 7, at 235-36.

1. The BJS Capital Punishment Database

The BJS tracks every person who is or has been under a sentence of death since 1973. The available data are current through 1995 and contain 6,228 observations.[48] To avoid the effects of early twists and turns in the post-*Furman v. Georgia*[49] modern death penalty era, we limit the sample to those defendants sentenced after 1984.[50] This matches the defendants being considered for potential relief from death sentences with the time span covered by the Uniform Crime Reports murder data we rely on to measure death-obtaining behavior. Since the relief data are current through 1995, there is a one year lag in the measure of murders. This allows cases to become ripe for relief during the time period covered by the BJS data. We further limit the sample to the 21 states in our appellate opinion database. These selection criteria yield 3,046 observations in the BJS data.

The BJS data come from the prisons in which inmates are held as part of the National Prisoner Statistics program.[51] The data include information on inmates whose death sentences were removed. Of particular interest is information about the reason for an inmate's removal from being classified as under sentence of death. The BJS data include among the reasons for removal whether a capital sentence was declared unconstitutional, whether a capital sentence was overturned, and whether both a conviction and capital sentence were overturned.[52] We define a variable, "relief," meaning relief from a death sentence, to equal one when these reasons for removal are present. We define relief to equal zero when a prisoner, remains on death row, was executed, or died from other causes while on death row.

2. The Appellate Case Sample

Our appellate case sample consists of every direct appeal of a death penalty case available on Westlaw for the three-year period 1995 to 1997 for 26 states. The states are: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Missouri, Mississippi, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Virginia. These states account for 3,112 of the 3,208 (97.0 percent)

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[48] BJS, supra note 8, at i. The same defendant may comprise more than one observation in the data. These defendants presumably were removed from death row reentered after a resentencing proceeding or a subsequent conviction and death sentence. In counting the number of death sentences in each state, we limit each defendant to one observation. In the regression models reported below, we account for the possibility of multiple observations of individual defendants.

[49] 408 U.S. 238 (1972).

[50] In Gregg v. Georgia, 428 U.S. 153 (1976), the Court approved several new death penalty statutes on the grounds that they addressed the problems of arbitrariness and discrimination identified in *Furman*. By 1983, in cases such as Zant v. Stephens, 462 U.S. 862 (1983) and Barclay v. Florida, 463 U.S. 939 (1983), the Court had dismantled "most of the procedural restrictions that were imposed on capital sentencing by *Gregg* and the other 1976 death penalty cases." Samuel R. Gross & Robert Mauro, Death and Discrimination: Racial Disparities in Capital Sentencing 13-14 n.30 (1989).

[51] BJS, supra note 8.

[52] BJS, supra note 8, at 10.

state prisoners under sentence of death as of December 31,1996.[53] We drop Connecticut, Delaware, New Hampshire, New Jersey, and Utah cases from our appellate case analysis because these states have too few death penalty cases to permit meaningful analysis. This leaves 21 states in the state appellate case sample.

We used search terms broad enough to identify capital cases in each state. We and research assistants recorded information about each case. The information recorded includes whether the case involved a resentencing.

To compute a state's reversal rate in capital cases, we divide the number of appellate cases in which the defendant achieved some success by the number of appellate cases found. Success is not a self-defining term in assessing litigation.[54] It is possible to have a death sentence vacated on appeal, have the case remanded to a trial court, and have a death sentence imposed again. At the end of such a process, the defendant may be no better off than at the beginning, except for the delay, which is itself a nontrivial benefit to a prisoner under sentence of death. For defendants with more than one appeal in the database, we used the most recent appeal. Thus, for example, if a defendant's conviction were affirmed by an intermediate appellate court and a state supreme court, only the latter case is retained. We do not otherwise trace each case's subsequent history. We are taking a snapshot of the process as of a substantial (three year) period of time.

We define success to exist (a reversal to have occurred) when the defendant obtains a ruling that precludes imposition of a death sentence unless further action is taken by some court. So reversals of convictions, remands for hearings on specific issues, vacation of death sentences, and remands for resentencing are defendant successes. Complications arise when both parties appeal or when the state appeals. We limit our analysis to cases in which the defendant's appeal seeks relief from a death sentence. Thus, appeals by the state are not included.

Using the 1995 to 1997 appellate opinion data matches the defendants' appeals being considered for reversal with the time span covered by the Uniform Crime Reports 1994 to 1996 murder data, with a one year lag in the measure of murders. The one year lag in the measure of murders allows the cases to become ripe for adjudication during the time period covered by the appellate data.

Important differences exist between the BJS-based measure of obtaining relief from death sentences and the measure based on our reported appellate opinions. First, the reported opinions cover the years 1995 to 1997. The BJS data try to include all persons on death row, and any relief they obtained, through 1995. Differences in the two measures of capital defendant success rates may result from events relating to a state's capital defendant population for only one of the time periods. For example, a single Supreme Court case may have required reversal of many convictions within a state before 1995.[55] The case may lead to a burst of death penalty reversals before 1995, followed by a period of low reversals after 1995.

Second, our opinion data are limited to state courts. We are primarily interested in the effect of judicial selection method across states and therefore do no include federal cases among opinions read. The BJS data include relief from death sentences by both state and

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[53] Tracy L. Snell, U.S. Department of Justice, Bureau of Justice Statistics, Capital Punishment 1996, at 6 (December 1997) (Table 5).
[54] See Theodore Eisenberg & Stewart J. Schwab, What Shapes Perceptions of the Federal Court System?, 56 U. Chi. L. Rev. 501, 517 (1989).
[55] McKoy v. North Carolina, 494 U.S. 433 (1990).

federal courts. The BJS data do not allow one to distinguish between relief granted by the two court systems.

We thus have measures of both trial level death-obtaining behavior in a state and measures of defendants' appellate and other success in obtaining relief from death sentences. These measures should be positively correlated. The appellate rate of reversing death penalty cases should be a function of how liberally the state seeks and obtains death in murder cases. In a state that obtains death sentences relatively often (as measured by a high ratio of death penalty direct appeals to murders), there should be an increased chance of reversal. A high death-obtaining rate should mean that weaker (less death-worthy) cases are brought. Reversals should come at a higher rate.

A caveat about the use of appellate opinions is in order. Opinions, both trial level and appellate, may not be representative of all underlying cases.[56] For example, published opinions in cases involving punitive damages awards have systematically higher awards than the mass of trial level punitive damages cases that do not result in published opinions.[57] But this concern is less of a problem in death penalty cases than in other classes of cases. Both common sense and some evidence indicate that little selection of cases is at work in the decision to appeal a death sentence. A person condemned to death has little to lose by appealing. And rates of appeal in death penalty habeas corpus proceedings are by far the highest of any area of law for which the Administrative Office of U.S. Courts maintains data.[58]

Table 1 summarizes the sources of data used in this study, as described in Parts III.A. and III.B. It separates the sources by our two different studies of death penalty adjudication, the BJS data and our appellate opinion data.

Table 1. Data Sources for Numbers of Murders, Death Penalties, Death-Obtaining Rates, and Relief Rates

study based on	number of murders	number of death penalties	death-obtaining rates	relief rates
BJS data	FBI data 1985-94	BJS data 1985-94	murders/death penalties	BJS data 1985-95
appellate opinion data	FBI data 1994-96	BJS data 1994-96	murders/death penalties	appellate data 1995-97

C. Descriptive Statistics

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[56] Theodore Eisenberg & Sheri Lynn Johnson, The Effects of Intent: Do We Know How Legal Standards Work?, 76 Cornell L. Rev. 1151 (1991); Theodore Eisenberg & Stewart Schwab, What Shapes Perceptions of the Federal Court System?, 56 U. Chicago L. Rev. 501 (1989); Peter Siegelman & John J. Donohue III, Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases, 24 Law & Soc'y Rev. 1133 (1990) (a comparison of published and unpublished cases reveals substantial differences between them); Vicki Schultz & Stephen Petterson, Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. Chi. L. Rev. 1073 (1992).
[57] Theodore Eisenberg & Martin T. Wells, The Predictability of Punitive Damages Awards in Published Opinions, the Impact of *BMW v. Gore* on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced (unpublished paper).
[58] Theodore Eisenberg, Empirical Evidence Relating to Prisoner Filings, presented at the Federal Judicial Center's Workshop on § 1983 Litigation for District Judges and Magistrates, August 13-15, 1997, Denver, Colorado.

Table 2 reports descriptive statistics for the key variables in this study. Four pairs of columns should be distinguished: the numbers of murders in columns 1 and 2, the numbers of death penalties in columns 3 and 4, states' death-obtaining rates in columns 5 and 6, and rates of obtaining relief from death sentences in columns 7 and 8. Column 9 reports the number of direct death penalty appeals reported for each state from 1995 to 1997. Column 10 reports whether the state has partisan judicial elections.

The first two columns show the number of murders in each state from 1994 through 1996, and from 1985 through 1994, respectively.[59] For the appellate opinion data covering 1995 to 1997, we use the shorter period to compute a death-obtaining rate. For the BJS measure of the number of death penalties, the longer period is appropriate because the data on capital prisoners extend from 1985 through 1995.

Table 2's third and fourth columns report our two measures of the number of death penalties. The BJS data in the third column are the number of death penalties imposed from 1985 through 1994. The data in the fourth column are the number of death penalties imposed from 1994 through 1996.[60]

The two death-obtaining rates reported in columns 5 and 6 are computed from the number-of-murder and number-of-death-penalty columns. The first death-obtaining rate column is the percent of murders from 1994 to 1996 that led to a death sentence in that period. The second rate column is the percent of murders from 1985 through 1994 that led to a death sentence from 1985 through 1994, according to BJS. These two measures of death-obtaining behavior are best viewed as indices facilitating interstate comparison rather than as measures of absolute activity levels. Thus the relations among the states' numbers in the death-obtaining rate columns are important, not their absolute levels. If one wants to relate a death-obtaining rate to real world events, Table 2's first row suggests, for example, that in Alabama 3.27 percent of the murders from 1985 through 1994 led to imposition of the death penalty. In Oklahoma, that rate was almost six percent.

The death penalty relief columns show defendants' rate of success in contesting death sentences. The first relief rate column is the percent of death sentences imposed from1985 through1995 for which BJS reports a defendant receiving relief, either through reversal of conviction, reduction of sentence, or both. The second relief rate is the percent of 1995 to 1997 death penalty appellate opinions in which the defendant receives some relief.

Table 2's two death-obtaining rate columns, columns 5 and 6, show substantial interstate variation in death-obtaining behavior. For example, both columns show that Oklahoma, Nevada, North Carolina, Mississippi, Arizona, Alabama, and Florida have high death-obtaining rates. Both columns indicate that California has a low rate of death-obtaining trial level behavior.

Table 2's penultimate column reports the number of direct capital case appeals from 1995 through 1997. These form the basis for computing the appellate reversal rates reported in column 8.

Table 2. Murders, Death Penalties, Death-Obtaining Rates, Relief Rates, by State

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)

[59] The online version of the Uniform Crime Reports is missing the number of murders in Kentucky for 1988 and the number of murders in Florida for 1988 through 1991. We used interpolation to fill in these missing values.

[60] The 1996 data come from Snell, supra note 51.

| state | number of murders | | number of death penalties | | death-obtaining rates (%) | | percent granted relief | | number of direct appeals | partisan judicial elections |
	FBI data 1994-96	FBI data 1985-94	BJS data 1985-1994	BJS data 1994-96	1994-96 (4)/(1)	1985-94 (3)/(2)	BJS data, 1985-95	appellate data, 1995-97		
AL	1,387	4,440	145	55	3.97	3.27	23.5	22.4	54	yes
AR	741	2,188	44	15	2.02	2.01	28.6	31.6	19	yes
AZ	1,205	2,939	109	22	1.83	3.71	17.6	16.1	31	no
CA	10,258	34,622	322	98	0.96	0.93	0.6	12.1	33	no
FL	3,101	12,333	402	96	3.10	3.26	33.6	39.1	96	no
GA	1,928	6,740	102	20	1.04	1.51	26.2	12.5	16	no
IL	2,708	8,554	153	38	1.40	1.79	21.1	27.7	47	yes
IN	985	2,866	46	8	0.81	1.61	30.4	7.1	14	no
KY	547	1,892	32	5	0.91	1.69	48.5	16.7	7	no
LA	2,210	5,449	67	27	1.22	1.23	26.8	29.6	27	no
MO	1,321	4,365	98	28	2.12	2.25	11.8	17.1	35	no
MS	573	1,837	68	19	3.32	3.70	40.6	39.3	28	yes
NC	1,991	6,100	187	83	4.17	3.07	39.9	7.6	66	yes
NV	542	1,131	69	28	5.17	6.10	15.5	8.0	25	no
OH	1,552	5,810	155	47	3.03	2.67	11.8	11.9	67	no
OK	684	2,387	139	42	6.14	5.82	22.0	27.1	50	no
PA	2,018	6,454	189	53	2.63	2.93	11.3	13.6	59	yes
SC	971	3,370	68	25	2.57	2.02	26.8	19.0	22	no*
TN	1,291	4,099	83	11	0.85	2.02	19.8	33.3	27	yes
TX	5,061	21,519	395	120	2.37	1.84	6.9	12.3	81	yes
VA	1,536	4,904	65	17	1.11	1.33	4.5	0.0	18	no*

* elected by legislature

Anecdotal evidence supports the death-obtaining rates reported in columns 5 and 6. The fairly high rate for Pennsylvania is consistent with the Philadelphia district attorney's dedication to seeking the death penalty.[61] Pennsylvania's death-obtaining rate is kept from being extremely high by a much lower rate of death-seeking behavior by Pittsburgh's district attorney.[62] Texas' more moderate rate of death-obtaining behavior is consistent with reported levels of death-seeking behavior by Dallas and Houston district attorneys.[63] California's low rate of death-obtaining behavior is consistent with reported low death-seeking and death-obtaining rates in Los Angeles County.[64] Louisiana's low rate of death-obtaining behavior is consistent with the reported lack of success of the New Orleans district attorney in obtaining death sentences.[65] Illinois' moderate rate of death-

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[61] Rosenberg, supra note 6.
[62] Id. at 24 (about one defendant per year receives a death sentence in Alleghany County).
[63] Id. Although Houston's district attorney has a reputation as a champion of the death penalty, he asked for it in only ten percent of the eligible cases in one year. Id.
[64] Id. (death penalty sought in 18 of 2,000 homicides and obtained in six cases).
[65] Id. (New Orleans district attorney asks for death in every eligible homicide, but has obtained it only twice in five years.).

obtaining behavior is consistent with relatively few capital sentences being imposed in Chicago.[66]

Table 2's relief columns show substantial interstate variation in relief rates. In the appellate opinion relief column, column 8, Arkansas, Florida, Louisiana, Mississippi, and Tennessee have the highest reversal rates. Virginia has the lowest. In the BJS data-based relief column, the highest relief rates are found in Kentucky, North Carolina, and Mississippi. We thus find not only interstate variation in relief rates but some variation in relief rates across our two measures of relief.

IV. Explaining the Pattern of Relief from Death Sentences

States thus have a broad range of death penalty reversal rates. The interstate differences in each of Table 2's relief columns are statistically significant (p<.0001).[67] But the differences between the two relief columns, and the different contents of their underlying data, suggest the need to explore the two relief rate patterns separately.

To assess the effect of differences in judicial selection methods on case outcomes, Table 2's appellate opinion relief column, column 8, is more appropriate than the BJS-based column 7 because only the opinion column is limited to decisions by state court judges. The BJS-based relief rates includes all possible modes of obtaining relief, including habeas corpus cases decided by federal judges.

A. The Absence of a Correlation Between Selection Method and Reversals

In the appellate data, the hypothesis that partisan election of judges correlates with death penalty affirmance holds up for Georgia, North Carolina, Pennsylvania, and Texas. All have partisan elections and low reversal rates. South Carolina and Virginia could also be viewed as fitting the pattern because their legislatures elect supreme court justices. But column 8 also shows that Alabama, Mississippi, and Illinois, which have partisan elections, have high capital sentence reversal rates. Partisan elections, standing alone, cannot explain the pattern of appellate results. States without partisan elections also show varying reversal rates. Oklahoma and Florida have high reversal rates. Indiana has a low reversal rate. Overall, we do not find a statistically significant relation between judicial selection method and reversal rate. A test of the significance of their relation is significant

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[66] Id. (Chicago district attorney asks for death in a large majority of eligible cases but obtains only about seven death penalties a year.).

[67] By convention, the hypothesis being tested is called the null hypothesis. GEORGE W. SNEDECOR & WILLIAM G. COCHRAN, STATISTICAL METHODS 64 (8th ed. 1989). The reported significance level is the probability of rejecting the null hypothesis when it is true. That is, the significance level provides an inverse measure of the likelihood that the correlation between death-obtaining rates a real relation rather than mere random variation. The smaller the significance level, the more surprised one would be to observe the relation if the tested hypothesis (no relation) were true. Id. By arbitrary convention, results that are significant at or below the .05 level are described as statistically significant. E.g., THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 197 (STEPHEN E. FIENBERG ED., 1989).

at the .661 level.[68] If we count South Carolina and Virginia as partisan election states because their legislatures play a role in selecting judges, the significance level is .255.

Part of the reason why judicial selection method may not explain the data well is that the classification of judicial selection methods is crude. For example, in the customary classification of state judicial selection methods, both New York and Texas are classified as partisan election states.[69] Yet one hears much less complaining about the influence of campaign funding and contributions on justice with respect to New York than one hears about the topic with respect to Texas.[70] And nominally nonpartisan judicial elections can take on the characteristics of partisan contests.[71] Indeed, if we take the liberty of reclassifying Ohio, which officially has nonpartisan judicial elections but in fact seems to have partisan elections,[72] a significant relation between partisan election status and reversal rates does emerge (p=.032).

So, depending on how strictly one adheres to conventional classification of judicial election methods, there is or is not evidence of a relation between selection method and death penalty case outcomes. But the relation depends largely on how one state, Ohio, is classified and the relation does not hold for the mass of states. Whatever the reason, the conventional wisdom about partisan judicial elections at best modestly explains the observed state-level pattern of appellate reversal rates in capital cases.

B. Accounting for Case Selection: Appellate Opinion Reversal Rates

Prospects for explaining the pattern might improve if we account for case selection. Figure 1 shows the relation between the appellate reversal rate in capital cases (Table 2, column 8) and the rate at which states obtain the death penalty (Table 2, column 5). The expected relation between death-obtaining rates and reversal rates does not emerge.

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[68] The significance level reported in text is based on Fisher's exact test. For a discussion of the benefits of Fisher's exact test over chi-squared significance test, see ALAN AGRESTI, ANALYSIS OF ORDINAL CATEGORICAL DATA 11 (1984).

[69] Authorities cited note 40 supra.

[70] E.g., Clay Robison, Ex-high Court Judges Dispute Payola Claims / Campaign Donations Don't Sway,They Say, Houston Chronicle, Aug. 15, 1998; Editorial, Then and Now Texas JusticeHas Improved, But Reform Still Needed, The Dallas Morning News, July 25, 1998.

[71] Mark Hansen, A Run for the Bench, A.B.A. J., Oct. 1998, at 68, 69 ("Even nonpartisan elections become political tinderboxes when special interests get involved.")

[72] See note 40 supra.

Figure 1. Relation Between States' Death Obtaining Rates and Death Penalty Reversal Rates–The death-obtaining rate is an index to allow comparing death-obtaining rates across states. It is based on the number of death sentences from 1994 to 1996 and the state's murder rate from 1994 to 1996. The reversal rate is the proportion of 1995-1997 capital case opinions that reverse death sentences. Sources: Westlaw; U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment in the United States, 1973-1995 (Inter-university Consortium for Political and Social Research 6956); U.S. Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reporting Program, Supplemental Homicide Reports, 1996 (Inter-university Consortium for Political and Social Research 9028).

Perhaps, however, a discernable pattern would emerge if we simultaneously account for judicial selection methods *and* death-obtaining rates. This requires multivariate analysis of the data. Multiple regression is a statistical technique that quantifies the influence of each of several factors (independent variables) on the phenomenon being studied (dependent variable). Multiple regression works to segregate the effects of various factors, such as case selection and judicial selection.[73] Since our cases have
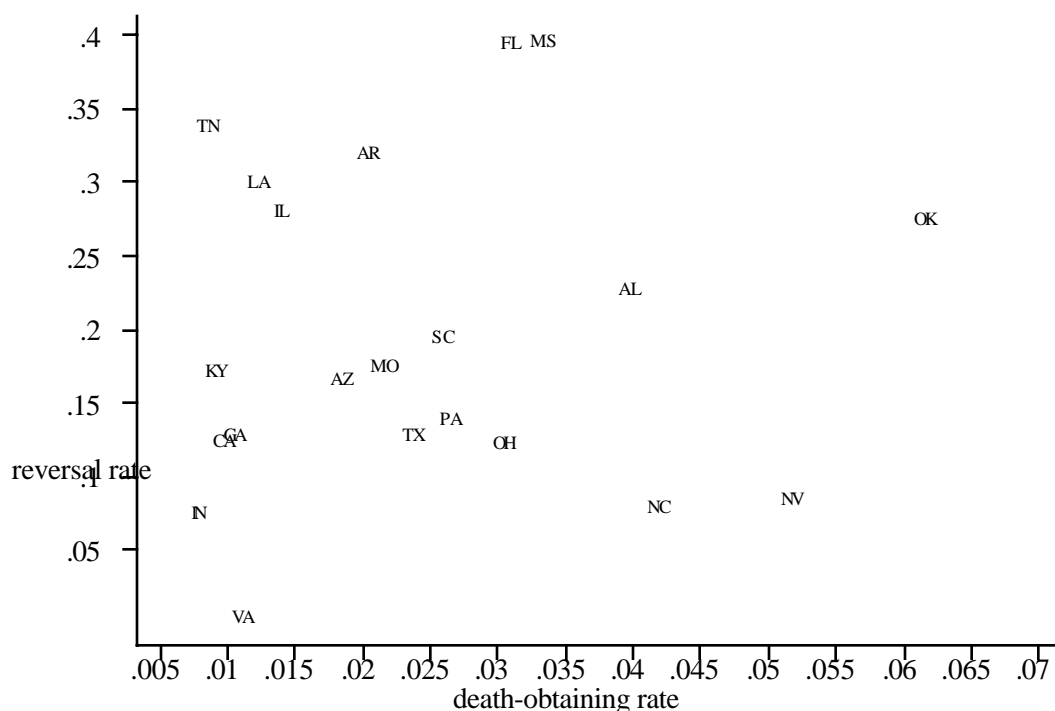
dichotomous outcomes, death sentences are either reversed or not, we use logistic regression.[74] We also account for the fact that the data are sampled by state.[75] For this

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[73] See generally Michael O. Finkelstein & Bruce Levin, Statistics for Lawyers ch. 12 (1990).
[74] See Finkelstein & Levin, supra note 71, at 448.

study, the dependent variable is whether the case resulted in a reversal and the primary independent variables are the death-obtaining (case selection) rate and a dummy variable that equals one if a state has partisan judicial elecitons.

Regression analysis allows us to control for another factor. Defendants appealing from reimposition of previously imposed, but reversed, death sentences are likely, on average, to be weak candidates for reversal. These defendants have been previously sentenced to death. The subsequent resentencing to death, the subject of appeal in our data, can be taken as some evidence that these cases are death-worthy, or that the arguments against death have been not been able to be forcefully marshaled. Whatever the reason for the prior death sentence, it seems appropriate to account for whether an appeal involves a second death sentence. Simple statistics confirm the possible need to control for this factor. Nine of 59 (15 percent) resentencings led to reversals compared to 153 of 749 (20 percent) of cases not involving resentencings.[76] To control for the kind of appeal, we include a dummy variable equal to one for resentencing cases and zero otherwise.

Table 3 summarizes the independent variables in our model of appellate reversals. It includes a second partisan election variable, which treats South Carolina and Virginia as states with partisan judicial elections. Table 3's next-to-last column shows that no variable is significantly correlated with appellate reversal rates of death sentences (Table 2's column 8).

Table 3. Descriptive Statistics, Death Sentences in States with Nine or More Direct Capital Case Appeals from1995-1997

	mean	standard deviation	minimum	maximum	significance of relation to reversal rate	n
reversal rate	.202	.401	0	1		809
state's death-obtaining rate, 1994-1996	.028	.014	.008	.061	.423	812
partisan election state	.464	.499	0	1	.661	812
partisan election state, including SC & VA	.512	.499	0	1	.255	812
resentencing	.073	.260	0	1	.401	811

Regression analysis confirms the absence of such correlations. Table 4 reports the regression results for a model using the variables in Table 3. The negative sign on the partisan election dummy variable indicates that appellate win rates correlate negatively with judicial selection by partisan elections. But this correlation is not statistically significant. Nor does the death obtaining rate appreciably help in explaining reversals of death sentences. These results provide little support for the influence of case selection or the influence of judicial selection methods on death penalty case appellate outcomes. We do note, however, that reclassifying Ohio as having partisan elections would yield a larger and more significant (p=.033) coefficient for the partisan election variable.

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[75] See Martin Frankel, Sampling Theory, in Handbook of Survey Research 21, 37-40 (Peter H. Rossi, James D. Wright, and Andy B. Anderson eds. 1983) (describing stratified sampling).

[76] Using Fisher's exact test, this difference is significant at the .401 level.

Table 4. Logistic Regression Analysis of Appellate Reversal Rates in Capital Cases, 1995-1997

dependent variable = reversal of death sentence

death-obtaining rate, 1994-1996	1.855
	(.762)
partisan election state (includes SC and VA)	-.187
	(.275)
resentencing	-.352
	(.346)
constant	-1.319
	(.000)
F-test significance of model	.522
number of cases	808
number of states	21

significance levels in parentheses

C. Accounting for Case Selection: BJS Data

Relief rates based on the BJS data can be compared to the appellate opinion-based results. As in the case of the appellate data, we control for each state's death-obtaining rate. We also use the partisan election dummy variable to control for judicial selection method.

The BJS data allow us to control for other characteristics that might relate to the likelihood of obtaining relief. We control for defendant race by dummy variables for black and hispanic. We control for defendant marital status by dummy variables for married and for whether a defendant was divorced or separated. We also control for defendant age and education.[77] We control for the defendants' legal status at the time of the capital offense through two variables. A dummy variable, "charges pending," is one if the defendant was not under sentence at the time of the capital offense but charges were pending. A second dummy variable, "under sentence," is one if the defendant was on probation, on parole, had escaped, or was imprisoned at the time of the capital offense. We control for whether the defendant had been convicted of a prior murder through the dummy variable, "prior murder."

For North Carolina, it is appropriate to account for one case that led to an unusual number of grants of relief during the period covered by the BJS data. In *McKoy v. North Carolina*,[78] the Supreme Court held that North Carolina's requirement that jurors agree unanimously on mitigating factors impermissibly limits jurors' consideration of mitigating evidence. A sharp decrease in relief from North Carolina death sentences occurs for defendants sentenced after *McKoy*.[79] We therefore include a dummy variable

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[77]   Education is coded on a 1 to 11 scale, with 1 representing less than a 7th grade education and 11 representing more than four years of college. BJS, supra note 8, at 6. Defendant race, marital status, age, and education are not reported in most appellate opinions.

[78]   494 U.S. 433 (1990).

[79]   BJS data show that relief was granted to 38 of 41 North Carolina defendants in the years 1987 through 1989. For 1991 and 1992, relief was granted to 16 of 42 North Carolina defendants.   On remand, the Supreme Court of North Carolina decided that the U.S. Supreme Court's decision did not invalidate North Carolina's entire statutory death penalty scheme, State v. McKoy, 394 S.E.2d

equal to one for North Carolina defendants sentenced to death before March 5, 1990, the date *McKoy* was decided.[80]

Table 5 presents descriptive statistics of the BJS variables used, together with the significance of their relation to whether relief was obtained. It includes death sentences imposed after 1984 in the states covered by the appellate data. Strong correlations exist between whether a defendant was under sentence (as defined above) and whether the defendant obtains relief from a capital sentence. Education correlates negatively with relief, the more educated a defendant the less likely relief was obtained. Education may be functioning as a proxy for mental illness or retardation. Women are significantly more likely than men to obtain relief from death row.

The primary variables of interest are the states' death-obtaining rate and the state's partisan election status. Unlike Table 3, Table 5 shows a significant correlation between death-obtaining rates and obtaining relief from death sentences. Like Table 3, it shows no significant relation between partisan election of judges and obtaining relief from death sentences. And this result is independent of how Ohio is characterized.

Table 5. Descriptive Statistics, Death Sentences in 21 States, 1985-1995

	mean	standard deviation	minimum	maximum	significance	number
relief granted to defendant	0.20	0.40	0	1		3,046
black defendant	0.42	0.49	0	1	0.406	3,046
hispanic defendant	0.08	0.26	0	1	0.168	3,046
female defendant	0.02	0.14	0	1	0.016	3,046
married defendant	0.22	0.42	0	1	0.063	3,046
divorced or separated defendant	0.20	0.40	0	1	0.909	3,046
age of defendant	30.97	8.88	16	77	0.235	3,046
education of defendant	4.80	1.99	1	11	0.000	2,637
charges pending at time of crime	0.06	0.25	0	1	0.643	3,046
under sentence at time of crime	0.30	0.46	0	1	0.000	3,046
prior murder conviction	0.06	0.23	0	1	0.272	3,046
state's death-obtaining rate, 1985-94	2.58	1.24	0.94	6.1	0.000	3,046
year of sentencing	1990.03	3.22	1985	1995	0.000	3,046
partisan election state	0.43	0.50	0	1	0.748	3,046
McKoy dummy variable (for N.C.)	0.02	0.15	0	1	0.000	3,046

Importantly, Table 5 shows that a defendant's year of sentencing is significantly correlated with the grant of relief. In particular, the earlier the sentencing year the more

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426 (N.C. 1990), but only an important judge-made jury instruction requiring unanimity with respect to mitigating circumstances.

[80] We have explored the effect of including a dummy variable for Skipper v. South Carolina, 476 U.S. 1 (1986), in which the Supreme Court held South Carolina erroneously excluded mitigating evidence consisting of the testimony of two jailers and a visitor to the effect that the defendant had made a good adjustment during the 7 1/2 months he had spent in jail between his arrest and trial. Such a variable has no material effect on our results.

likely the defendant is to have obtained relief from a death sentence. This raises the problem of what is termed data censoring, which we explore in Table 6.

Table 6 reports, by year, the relief rates based on the BJS data. Each row shows the proportion of cases in which relief was granted for a year of sentencing. For example, 43 percent of the defendants sentenced to death in 1985 obtained, at some point, some relief from their death sentence or conviction. Table 6 shows a decline in relief over time, with the relief rate reaching zero in 1995, the most recent sentencing year in the data. The data are censored in the sense that relief from death sentences apparently takes a substantial period of time to obtain. Those who have been on death row only briefly are much less likely to have obtained relief from their death sentences. It may also be that obtaining relief in recent years has become more difficult. But the delay between sentence and relief would lead to a declining relief rate being observed even if there were no decrease in the rate at relief was in fact being granted. Enough time has not elapsed for recently sentenced defendants to have obtained relief.

Table 6. Relief Rates from Death by Year of Sentencing, BJS Data, 1985-1995

year of sentence	relief rate	number of death sentences
1985	.431	288
1986	.329	310
1987	.348	296
1988	.296	314
1989	.303	271
1990	.257	265
1991	.170	276
1992	.122	294
1993	.042	289
1994	.009	318
1995	.000	308

The presence of censoring suggests the propriety of survival time models for the BJS data.[81] They account for the fact that the event of interest, in this case relief from a death sentence, may not have occurred merely because sufficient time has not elapsed.[82] Such models also allow for different times of entry into the sample, which we have in the form of different years of sentencing,[83] and exit from and reentry into the sample, which occurs when defendants obtain relief and are later resentenced to death. These features make a survival time proportional hazard model preferable to a simple logistic regression model, which ignores the time to an event (relief from a death sentence in our case) and censoring.[84] Table 7 reports Cox proportional hazard models.[85] We have also used logistic regression models but the results do not differ materially from those reported here.

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[81] D.R. Cox & D. Oakes, Analysis of Survival Data 4 (1984); David G. Kleinbaum, Survival Analysis: A Self-Learning Text 5-7 (1996).

[82] Cox & Oakes, supra note 79, at 4; Kleinbaum, supra note 79, at 5-8.

[83] Cox & Oakes, supra note 79, at 2.

[84] Kleinbaum supra note 79, at 98.

[85] Cox models are considered to be the most popular of the survival models. Kleinbaum, supra note 79, at 96-98. For discussion of the choice among survival models, see id.

Table 7 reports two models. The second model excludes the defendant's education variable, which is missing for almost 400 defendants. As is common for proportional hazard models, the coefficients are reported as hazard ratios.[86] A hazard ratio of one means that a variable has no effect. A hazard ratio of ten, for example, means that a unit increase in the dependent variable corresponds to a ten times increase in the likelihood of relief. A hazard ratio of .1 implies that a unit increase in the dependent variable corresponds to a ten time reduction in the likelihood of relief.

Table 7 confirms the simple statistics presented in Table 5. Of particular interest is the significance of the state's death-obtaining rate. A strong, significant correlation exists between death-obtaining behavior and relief from death sentences. A one percent increase in a state's death-obtaining rate (for example, from one percent to two percent) corresponds to about a twenty percent increase in the likelihood of relief being granted.[87]

Table 7. Cox Proportional Hazard Models of Relief from Death Sentences, 1985-1995

Time variable is months to relief. Censoring occurs for cases in which no relief has been granted.

black defendant	1.031	1.087
	(.74)	(.343)
hispanic defendant	.765	.900
	(.153)	(.541)
female defendant	1.764	1.810
	(.016)	(.011)
married defendant	1.055	1.043
	(.619)	(.681)
divorced or separated defendant	.806	.824
	(.083)	(.102)
defendant's age	1.010	1.009
	(.055)	(.072)
defendant's education	.941	-
	(.006)	-
charges pending at time of capital crime	.938	1.034
	(.732)	(.847)
defendant under sentence at time of capital crime	.741	.764
	(.004)	(.007)
defendant committed prior murder	.605	.740
	(.015)	(.109)
state's death-obtaining rate, 1985-1994	1.185	1.200
	(.000)	(.000)
year of sentencing	.938	.929
	(.000)	(.000)
state has partisan judicial elections	.922	.932
	(.419)	(.456)
McKoy dummy variable for N.C. cases	4.483	4.591
	(.000)	(.000)

[86] Kleinbaum, supra note 79, at 33.

[87] To check whether the extreme censoring in the data affects the results, we ran the same model limited to prisoners entering death rows from 1985 to 1990. The results are not materially different from those reported in Table 7 except that the year-of-sentencing variable's hazard ratio is closer to one and insignificant.

prior death sentence	1.121	1.050
	(.500)	(.782)
number of defendants	2,557	2,956
number obtaining relief	537	600
log-likelihood	-3756.175	-4284.050
chi-squared probability	.0000	.0000

significance levels are in parentheses.

The other variable of primary interest, whether a state has partisan judicial elections, follows the pattern in the appellate opinion results reported in Table 4. The variable's effect is small and insignificant. This is true whether or not we treat South Carolina, Virginia, or Ohio as partisan election states. (The models reported in Table 7 do not treat them as partisan election states.)

Other results are also worth noting. Given equal crimes, available data suggest that women tend to receive shorter sentences than men.[88] Consistent with these findings, Table 7 contains evidence that women sentenced to death are more likely to obtain relief from their death sentences than are men. Defendants who commit capital crimes while under sentence for other crimes and defendants who have prior murder convictions are less likely to obtain relief from their capital sentences.

The explanation of why death-obtaining rates help explain case outcomes in the BJS data but not in the state court appellate data may rest in judicial selection method, but not in interstate differences in judicial selection method. The BJS data include grants of relief by federal courts and the state court appellate data do not. It may that the independence of federal judges leads them to be more likely to grant relief in marginal death sentence cases than state judges. This could lead to the observed correlation between grants of relief in the BJS data and the rates of death-obtaining behavior. That this effect all but vanishes in the state court appellate data may show that state judges know they face traditional elections or retention elections at some point in their career. The California experience taught them more than a decade ago that selection method does not provide insulation from politicization of the death penalty. Only the life tenure and independence of federal judges may provide the luxury of assessing death penalty cases based on their death-worthiness.

At this point we can only suggest the explanation based on the federal judiciary's greater independence. Expanding our appellate opinion database to encompass more years may yield more conclusive evidence. For example, if we had about ten years of data from state courts, as we do for federal and state courts combined in the BJS data, the absence of a correlation between cases' death-worthiness and outcome would be stronger evidence of differences between state and federal court processing of capital cases.

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[88]   Kathleen Daly, Gender and Sentencing: What We Know and Don't Know From Empirical Research, 8 Fed. Sent. Rep. 163 (No. 3 Nov.-Dec. 1995); Kathleen Daly & Rebecca L. Bordt, Sex Effects and Sentencing: An Analysis of the Statistical Literature, 12 Just. Q. 141 (1995); Michael S. Gelacak, Ilene H. Nagel & Barry L. Johnson, Departures Under The Federal Sentencing Guidelines: an Empirical And Jurisprudential Analysis, 81 Minn. L. Rev. 299, 353 (1996) (downward departure from sentencing guidelines for female white-collar offenders); Ilene H. Nagel & Barry L. Johnson, The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines, 85 J. Crim. Law. & Criminology 181, 185-87 (1994).

D. Another Measure of States' Tendencies to Impose the Death Penalty

As a last effort to detect judicial election effects, we combine Table 2's death-obtaining rates and relief rates to construct a new measure of states' tendencies to impose the death penalty and retain it on appeal. This measure is based on the percent of murders that lead to an affirmed death penalty. We can then test whether judicial selection method correlates with this more sophisticated measure of death-obtaining behavior.

Our new measure of death-obtaining behavior can be illustrated by example. The first entry in Table 2, column 5, shows that, for 1994 to 1996, 3.97 percent of Alabama's murders led to imposition of the death penalty. Table 2, column 8, shows that 22.4 percent of death penalties in Alabama were reversed. Conversely, 77.6 percent of death penalties were affirmed. So in a state in which 3.97 percent of murders led to death penalties, 77.6 percent of the death penalties were affirmed. We multiply the 77.6 affirmance rate by the 3.97 death-obtaining rate to yield an index of the percent of murders that led to an *affirmed* death penalty. In Alabama's case, the multiplication yields 3.08 percent. In other words, 3.08 of each 100 murders led to an affirmed death penalty. A similar calculation for each state allows interstate comparison of a death-obtaining rate that accounts for appellate review of death sentences. Table 8 presents the results.

Table 8. Number of Affirmed Death Penalty Cases
Per 100 Murders, by State, 1995-1997

State	Affirmed	State	Affirmed
NV	4.75	AZ	1.53
OK	4.54	AR	1.39
NC	3.85	VA	1.11
AL	3.08	IL	1.02
OH	2.67	GA	0.91
PA	2.27	LA	0.86
SC	2.08	CA	0.84
TX	2.08	KY	0.76
MS	2.01	IN	0.75
FL	1.88	TN	0.57
MO	1.76		

Table 8 confirms that states with large death rows do not necessarily obtain and affirm death penalties at high rates. Nevada and Oklahoma obtain and affirm death penalties at higher rates than other states. Their death rows are not among the largest. California's death row is one of the largest but its rate of obtaining and affirming death penalties is one of the lowest, and is the lowest of any major death penalty state. Texas is not extreme in its rate compared to other states. Mississippi and Florida combine high trial-level death-obtaining rates with high reversal rates to yield net death-obtaining rates that are moderate compared to other states.

Does this new "bottom-line" measure of death-obtaining behavior correlate with judicial selection method? Again, the answer is no. We find no correlation between partisan elections and this measure of death-obtaining behavior. The absence of

correlation does not depend on how South Carolina and Virginia, the two states with legislative participation in judicial selection, are classified, or on how Ohio is classified.[89]

E. State-Specific Evidence of Political Pressure

Neither the appellate opinion data, nor the BJS data, nor our new measure of death-obtaining behavior show a robust correlation between judicial selection method and treatment of death sentences. Nevertheless, California and a few other states provide state-specific stories worth exploring. These stories support the existence of a relation between politics and death penalty case outcomes, even if that relation cannot be explained by focusing on judicial selection method.

California combines an extremely low pre-1995 relief rate with a merely low appellate reversal rate from 1995 to 1997. As shown in Table 2 (columns 7 and 8), California's relief rate from capital sentences was less than one percent through 1995 and increased to about 10 percent from 1995 to 1997 in the appellate opinion data. This is consistent with a substantial period of extreme reluctance to overturn death sentences after Chief Justice Bird's removal in the mid-1980s, with a softening of that reluctance in recent years. In fact, only California has a pre-1995 relief rate that statistically significantly differs from its 1995 to 1997 appellate reversal rate.[90] But even that softening leaves California with a low reversal rate. This contrasts with a more liberal reversal rate prior to the period we study.[91]

Justice White's removal from office in Tennessee during the period covered by our appellate opinion data allows us to test the hypothesis that the removal affected that state's reversal rate. For the first two years of the appellate data in this study, 1995 and 1996 combined, reversals occurred in 8 of 13 (61.5 percent) Tennessee cases. In 1997, the first year after Justice White's removal, reversals occurred in 1 of 14 (7.1 percent) Tennessee cases. This difference is highly statistically significant (p=.004).[92]

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[89]   A word of caution is in order about interpreting the statistical insignificance of the difference between partisan election states' and other states' death-obtaining rates. Understanding why requires considering the power of a statistical test. The power of a test is the likelihood of detecting an effect of a specified size at a specified significance level. If a test is not very powerful, the likelihood of detecting the effect is small. Perfectly executed studies may fail to reveal socially important differences "simply because the sample sizes are too small to give the procedure enough power to detect the effect." Stanton A. Glantz, Primer of Biostatistics 178 (4th ed. 1997). It is important to consider a statistical test's power when one claims that no significant effect has been detected.

A power calculation requires specifying what change in the observed death-obtaining rates we would regard as socially meaningful. Having a high probability of detecting a statistically significant difference of a socially meaningful size requires a larger number of death penalty states than exists. So our failure to detect a significant difference should not be taken as firm evidence that no such difference exists.

[90]   North Carolina would so differ if pre-*McKoy* cases were included.

[91]   Uelmen, supra note 29, at 1136.

[92]   This significance level is based on Fisher's exact test. The finding of a relatively high reversal rate for the year prior to 1996 is consistent with another study of death penalty decisionmaking by the Tennessee Supreme Court. Professor Foley finds that, from 1990 to 1996, the Tennessee SupremeCourt moved from a low reversal rate to a high reversal rate in capital cases. Daniel J. Foley, Tennessee Supreme Court: A Statistical Analysis of an Ideological Shift After th 1990 Election, 64 Tenn. L. Rev. 155, 169-70 (1996) (pre-1990 election court upheld the death penalty in

To assess the effect of the politicization of judicial selection in South Carolina, we add to the sample South Carolina appellate capital cases from 1981 to 1994. Thus, for South Carolina, we have data from 1981-1997. As noted above, the state's Attorney General elected in 1994 ran on strong pro-death penalty views and a politicization of the death penalty. The Attorney General's election coincides with a noticeable change in the success rates of South Carolina capital cases on direct appeal to the state supreme court. From 1981 through 1993, 28 of 62 (45.2 percent) of death penalties were reversed. From 1994 through 1997, five of 25 (20 percent) of death penalties were reversed. This difference is statistically significant at the .031 level.[93] Even the 20 percent recent reversal rate may be artificially high because of reversals required by United States Supreme Court cases.[94]

In contrast to developments in California, Tennessee, and South Carolina, the politicization of the death penalty in Texas supreme court elections in 1994 seems not to have changed much that state's pattern of review in capital cases. Texas capital prisoners had little success in obtaining relief before 1995 and little success in obtaining appellate reversals from 1995-1997. But Texas' much publicized taste for death sentences is partly mythical. Texas' prosecutors obtain death penalties at lower rates than at least half the states with substantial numbers of death penalties. Similarly, Mississippi's rates of relief were not discernibly affected by the 1992 campaign against Justice Robertson. Mississippi continues to grant relief to capital defendants at high rates. This seems to be a function of Mississippi's high death-obtaining rate.[95]

Taken together, the state-specific stories suggest that judicial selection methods can neither insulate judges from political pressure nor always lead to quantifiable manifestations of such pressure. California lacks partisan judicial elections but justices were voted out of office on the death penalty issue. California continues to have a fairly low reversal rate in capital cases. Tennessee and South Carolina also support the existence of political pressure on judges in capital cases. But judicial behavior in capital cases has been politicized in Mississippi and Texas without noticeable changes in their treatment of capital cases.

Whether a state is classified as having partisan judicial selection methods is not a useful predictor of capital case outcomes. Specific state political campaigns raising the death penalty are more helpful in explaining case outcomes but even they do not always assure measurable change.

V. Conclusion

92% of 12 cases; post-1990 election court upheld the death penalty in 50% of 16 cases). This difference is statistically significant at the .039 level. It also suggests that one who studied the Tennessee Supreme Court before 1990 and after 1996 would observe little difference in death penalty affirmance rates.

[93] This significance level is based on Fisher's exact test.

[94] Simmons v. South Carolina, 512 U.S. 154 (1994); Skipper v. South Carolina, 476 U.S. 1 (1986). See note 78 supra.

[95] The reluctance of Pennsylvania's Supreme Court to challenge death sentences may be a consequence of the profound effect of a criminal justice incident on a recent gubernatorial election. Rosenberg, supra note 6, at 46. But, as Table 2 shows, Pennsylvania was not granting relief at high rates prior to 1995.

Differences in states' judicial selection methods explain little about interstate differences in capital case outcomes. But politicization of the death penalty issue has affected state court behavior. This seems to have occurred in California, Tennessee, and South Carolina.

We also theorized that judicial behavior in capital cases can only be understood if one accounts for the case selection process.[96] The BJS data, but not our appellate opinion data, show a strong correlation between states' death-obtaining behavior and reversal rates. In the BJS data, which include federal habeas corpus capital cases, states that obtain death penalties at a high rate tend to have them overturned at a high rate. This finding is consistent with the view that high death-obtaining rates correspond to death penalties being imposed in less death-worthy cases. Courts understandably overturn more capital sentences in such cases.

The absence of this finding in the state court appellate data may suggest that independent federal judges are more likely to react to the death worthiness of cases than are state judges who must face reelection or retention elections.

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[96] Other factors to consider include states' execution rates a nd remaining terms of judges, Hanssen, supra note 1, and effects of campaign activity and financing, Larry Aspin, Campaigns in Judicial Retention Elections: Do They Make A Difference?, 20 Justice System J. 1 (1998); Mary L. Payne, Mississippi Judicial Elections: A Problem Without A Solution?, 67 Miss. L.J. 1 (1997) (discussing cost of judicial campaigns).